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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1857

ALCOA STEAMSHIP COMPANY, INC.
(a New York Corporation),

Petitioner,

against

M/V NORDIC REGENT, her boilers, tackle, machinery and other appurtenances *in rem* and NORCROSS SHIPPING CO., INC. (a Liberian corporation), as her owner *in personam,*

Respondent.

MOTION AND BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

Motion and Statement of Interest of the *Amicus Curiae* in Support of the Petition for *Certiorari*.

The American Institute of Marine Underwriters (AIMU) is a national trade association of 122 insurance companies, each of which is authorized to engage in the business of marine insurance in one or more states of the United States.

Issues of extreme importance to AIMU and its member companies are presented by the petition for *certiorari*. AIMU's membership underwrites approximately 90% of the marine insurance written in the United States. This insurance covers vessels and cargoes engaged in world wide commerce and losses that may occur anywhere in the world. In filing this brief *amicus curiae*, AIMU is acting in support of the American marine insurance community.

The United States District Courts have traditionally been forums where a United States citizen would be afforded the opportunity to litigate his claims. AIMU is deeply concerned that the rights of its members be protected and that American plaintiffs not be denied the opportunity to litigate their claims in the United States.

AIMU's interest in this petition also arises out of a desire for uniformity and certainty in maritime law throughout the federal courts of the United States. The decisions of the Southern District of New York Court and the Court of Appeals for the Second Circuit *en banc* are in this instance contrary to the great weight of authority and seriously effect the American insurance community.

The Court of Appeals for the Second Circuit and the District Court of the Southern District of New York, in particular, have historically been principal tribunals for the trial in the United States of maritime cases, no matter where arising. The refusal of the District Court to exercise its jurisdiction in a case such as this, where plaintiff is an American citizen and resident and defendant is doing business in New York, seriously affects the rights of AIMU's membership, and indeed, of all American interests with respect to foreign trade. Since New York is the nation's largest port and its principal center for shipping, marine insurance and chartering, it is frequently the only place in the United States where jurisdiction can be obtained over a given foreign defendant or vessel in an admiralty case.

The decision of the Second Circuit fails to recognize the needs of all Americans involved in international commerce, including the shipping industry and insurance community. AIMU is confident that if consideration is given to all of the potential effects of the *en banc* decision, this Court will

maintain the uniformity and harmony of the law on *forum non conveniens.*

AIMU first participated in this case on rehearing to the Second Circuit Court of Appeals *amicus curiae.* It was then ordered by that Court to submit a brief in support of its position to the *en banc* panel as a party recognized as having a legitimate interest in the *forum non conveniens* issues to be considered. Acceptance of AIMU's brief *amicus curiae* in support of the petition for *certiorari* is consistent with proceedings thus far conducted in this matter.

In view of the foregoing reasons, AIMU respectfully prays that this Honorable Court accept its brief *amicus curiae.*

Respectfully submitted,

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BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Presented

A. Does the decision of the *en banc* majority of the United States Court of Appeals for the Second Circuit decided on February 25, 1980 so confuse the uniformity and harmony of the decisions of the United States Supreme Court and the Courts of Appeals in other Circuits as to require the supervision of this Court?

B. When, if ever, can an American citizen be relegated to a foreign tribunal and sent abroad on the basis of *forum non conveniens?*

C. Should judicial economy and court congestion have any effect on a district court's evaluation of *forum non conveniens* dismissal of an American plaintiff to a tribunal of a foreign country?

Statement of Facts

In *Alcoa Steamship Company, Inc.* v. *M/V Nordic Regent,* 453 F.Supp. 10 (S.D.N.Y. 1978), Alcoa Steamship Company, Inc. [petitioner herein], a New York corporation, commenced an action in the United States District Court for the Southern District of New York against the M/V Nordic Regent, *in rem,* and against her owner, Norcross Shipping Company, a Liberian corporation, *in personam,* for damages caused by the vessel when it collided with Aloca's pier at Point Tembladora, Trinidad, causing damages of approximately $8,000,000.00.

The judgment of the United States District Court conditionally dismissed the action on grounds of *forum non conveniens*.

On appeal, a divided panel of the United States Circuit Court of Appeals for the Second Circuit affirmed the district court's judgment.[1] On rehearing, the original panel's order of affirmance was withdrawn, and the differently divided panel issued a new order reversing the district court's judgment.[2] On *en banc* consideration of the appeal, the judgment and opinion of the panel on rehearing was vacated, and the judgment of the district court was reaffirmed.[3]

REASONS FOR GRANTING *CERTIORARI*

Introduction

The effect of the holding of the Court of Appeals for the Second Circuit is that an American citizen no longer has a right to the availability of an American court. To accomplish this result, the Second Circuit sets up a new framework for determining *forum non conveniens* dismissal which places an onerous burden on the American plaintiff rather than the defendant. The ultimate deciding factor appears to be the availability of calendar time in the court's docket. Thus, the decision seriously threatens to eliminate the right of an American plaintiff to sue a foreign defendant in an American court based upon the court's admiralty jurisdiction. It also undermines the separation of powers doctrine in which the legislative

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[1] *Alcoa Steamship Company, Inc.* v. *M/V Nordic Regent*, F.2d, slip op. 4587 (2d Cir. decided August 31, 1978).

[2] *Alcoa Steamship Company, Inc.* v. *M/V Nordic Regent*, F.2d, slip op. 5367 (2d Cir. decided January 10, 1979).

[3] *Alcoa Steamship Company, Inc.* v. *M/V Nordic Regent*, F.2d, slip op. 5945 (2d Cir. decided February 25, 1980) (*en banc*).

branch is empowered to establish courts of competent jurisdiction to hear disputes involving a foreign subject matter.

A. To Resolve Confusion Among the Circuits, This Court Should Set Guidelines as to When, if Ever, an American Plaintiff May Be Denied A Right of Recourse in the Federal Courts.

In *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947), the Supreme Court established that even a non-resident plaintiff's choice of forum should not be disturbed unless the balance of convenience is strongly in favor of the defendant. The Court reiterated this standard using stronger language in *Koster* v. *Lumbermens Mutual Casualty Co.,* 330 U.S. 518 (1947), which was decided on the same day as *Gulf Oil,* when it held that a resident plaintiff's choice of forum should not be disturbed "except upon a clear showing of facts which . . . establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience . . . ." *Id.* at 524. The burden of such a showing is cast upon the defendant in either case. The burden should be heavier with respect to relegating a resident plaintiff to another country than with respect to a non-resident plaintiff. Neither of the above cases involved relegating a resident American plaintiff to a tribunal in a foreign country.

The only exception to this standard was announced by the Supreme Court in *Bremen* v. *Zapata Off-Shore Co.,* 407 U.S. 1 (1972). In *Bremen,* the Court held that a contractual forum selection clause freely bargained for between an American plaintiff and a foreign defendant should bind the parties to the forum chosen in the contract. If an American plaintiff seeks to avoid the contractually chosen forum by commencing an action in its home jurisdiction, then that plaintiff must meet the heavy burden of showing that trial in the contractual forum would be so "manifestly and gravely inconvenient" that it would be "effectively deprived of a meaningful day in court." *Id.* at 19.

In *Alcoa,* there was a forum selection clause for the Southern District of New York with respect to charter party disputes between plaintiff and defendant's sole shareholder. This was ignored by the court below and instead, the *en banc* decision placed a similar burden upon this American plaintiff seeking to commence suit in the United States District Court for the Southern District of New York as it would if Alcoa had agreed upon a Trinidad forum. *Alcoa* contains no contractual aspects at all, but is a pure tort situation wherein defendant's vessel struck plaintiff's pier.

The *en banc* Court accepted defendant's contention that since the New York forum was inconvenient to the foreign defendant, then the American plaintiff must prove that transfer to a Trinidad tribunal would deprive it of substantial justice and due process of law. The Court arrived at this conclusion by obverse reading of the decision in *Koster* which provided two independent tests for analyzing *forum non conveniens* issues:

> "Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which *either* (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) *make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.* In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." 330 U.S. at 524 (emphasis added) *Alcoa* at 5954 (*en banc*)

The *Alcoa* decision ignored the first part of the *Koster* test by rejecting petitioner's contention that where an

American plaintiff is suing a foreign defendant, then plaintiff's action may be dismissed on *forum non conveniens* grounds only if defendant meets its burden of showing vexation or oppression.

This decision by the Court of Appeals for the Second Circuit has created a split among the Circuits. Courts in various other Circuits have expressed judicial reluctance to deny an American citizen the right to sue in his home forum by requiring the defendant to present clear evidence of extreme circumstances making it materially unjust to the defendant that jurisdiction remain in the American courts. *Hoffman* v. *Goberman,* 420 F.2d 423, 426 (3rd Cir. 1970); *Mobil Tankers Co., S.A.* v. *Mene Grande Oil Co.,* 363 F.2d 611, 614 (3rd Cir.) *cert. denied,* 385 U.S. 945 (1966); *Burt* v. *Isthmus Development Co.,* 218 F.2d 353, 357 (5th Cir.), *cert. denied,* 349 U.S. 922 (1955); *Founding Church of Scientology* v. *Verlag,* 536 F.2d 4299, 436 (D.C. Cir. 1976). Inconvenience suffered by the defendant is not sufficient to meet this criterion without additional proof of an intent by plaintiff to vex or harass. *Founding Church of Scientology* v. *Verlag, supra* at 436; *Hoffman* v. *Goberman, supra* at 426; *Mobil Tankers Co., S.A.* v. *Mene Grande Oil Co., supra* at 614.

Petitioner's contention that defendant has the burden of proving "vexation" is soundly based not only in American jurisprudence but the law of England as well. In a footnote, the *en banc* Court in *Alcoa* recognized that the position advocated by Alcoa was the "English standard for granting a motion to dismiss on the basis of *forum non conveniens* [which] required a showing that the trial of the case in the chosen forum would be vexatious and oppressive" *Alcoa* at 5992, n. 3 (*en banc*) (emphasis added). The Second Circuit failed to acknowledge that this is also United States law.

In any event, the significance of English decisions in areas of admiralty law should not be so lightly brushed

aside. In *Bremen* v. *Zapata Off-Shore Co., supra,* the Supreme Court set aside years of American precedent disapproving forum selection clauses. According great weight to the approach followed in England, the Court decided to enforce the clause in conformity with English decisions. The Court specifically noted the long experience of English courts in admiralty litigation. *Id.* at 12.

A motion to dismiss a complaint on the basis of *forum non conveniens* should be subject to special scrutiny in a case such as the one at bar. By the very nature of admiralty law, involving ships moving in international trade, traveling in international waters, an interested party may well expect to be involved in extensive far-flung litigation. *Louisville Underwriters,* 134 U.S. 488 (1890); see *Petition on Bloomfield Steamship Co.,* 422 F.2d 728, 736 (2d Cir. 1970). Hence, in admiralty, even an "alien plaintiff has the privilege of suing an alien defendant wherever he can serve him, or attach his property; and . . . if the defendant would avoid the suit, he must show that he will be unfairly prejudiced, unless it be removed to some other jurisdiction." *Kloeckner Reederei und Kohlenhandel G.M.b.H.* v. *A/S Hakedal,* 210 F.2d 754, 756 (2d Cir. 1954), *appeal dismissed per stipulation,* 348 U.S. 801 (1954); see *Poseidon* v. *Schiffahrt, G.M.b.H.* v. *M/S Netuno,* 474 F.2d 203, 205 (5th Cir. 1973). Should the rights of a resident U.S. plaintiff be less than those of a non-resident alien plaintiff?

B. This Court Should Set The Standards Controlling When, If Ever, An American Plaintiff Can Be Sent to a Foreign Tribunal.

In rejecting petitioner's contention to apply the "vexatious standard" in the instant case, the Second Circuit also adopted the district court's wooden analysis of the factors set forth in *Gulf Oil Corp.* v. *Gilbert, supra,* which the *en banc* Court held must be considered with regard to

a *forum non conveniens* analysis. Factors of "private" interest to be considered include:

> ". . . relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; . . . all other practical problems that make trial of a case easy, expeditious and inexpensive[;] the enforceability of a judgment if one is obtained . . . [and] the relative advantages and obstacles to a fair trial."
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> *Id.* at 508.

The factors of "public" interest to be evaluated are as follows: administrative difficulties resulting from litigation piling up in congested centers instead of being handled at its origin; jury duty burdening the people of the community which has no relation to the litigation; local interests in having localized controversies decided at home; and application of foreign law.

The district court blindly applied these factors to the instant case by reciting that the accident, damage and tortious conduct occurred in Trinidad; some of the witnesses which *may* be called are from Trinidad; the tides and currents around Trinidad *may* effect the trial of the case; the pilots' association *may* be impleaded if the case was tried in Trinidad; and the law of Trinidad and Tobago *may* be applied. *Alcoa* at 5972 (*en banc*). However, defendant offered no positive evidence or affidavit to the effect that retention by the U.S. courts would be unjust. *Leasco Data Processing Equipment Corp.* v. *Maxwell,* 468 F.2d 1326, 1344 (2d Cir. 1972); *Mobil Tankers Co., S.A.* v. *Mene Grande Oil Co., supra* at 614.

This manner of analyzing the *Gilbert* factors is anachronistic to modern admiralty litigation. The difficulty of obtaining distant witnesses (a problem which often arises

in cases of a maritime nature) has been largely alleviated by the use of deposition testimony. The significance of this trend was recognized by the majority in the *Bremen* case, *supra,* where Chief Justice Burger wrote that "it is not unusual for important issues in international admiralty cases to be dealt with by deposition." The effectiveness of this method was also recognized by the *Bremen* Court where it was noted that "[b]oth the District Court and the Court of Appeals majority appeared satisfied that [defendant] could receive a fair hearing . . . by using deposition testimony of its witnesses from distant places . . ." *Bremen, supra* at 19.

Easy access to sources of proof and witness testimony no longer presents the problem it did when the *Gilbert* case was decided. As aptly pointed out by Judge Oakes in the *Alcoa* case, "there are several jets a day between New York and Trinidad to transport witnesses, documents, and lawyers if need be." *Alcoa* at 5974 (*en banc*) (Judge Oakes concurring in dissenting opinion).

Furthermore, enforceability of a judgment no longer presents an obstacle in most cases. Letters of undertaking or bonds are generally put up by the insurance companies involved to insure payment of any judgment.

These are the practical realities of present day admiralty litigation which make the "trial of a case easy, expeditious and inexpensive"[4] and which must be properly weighed in a *forum non conveniens* analysis. In light of these considerations, the balancing of all pertinent factors would clearly not weigh in favor of the foreign defendant.

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[4] *Gulf Oil Corp.* v. *Gilbert, supra* at 508.

C. Judicial Economy and Court Congestion Should Not Be the Ultimate Factors in *Forum Non Conveniens* Dismissal Relegating An American Plaintiff to a Foreign Tribunal.

The *en banc* opinion of the Second Circuit relied to a great extent on the 1947 decision of this Court in *Gulf Oil Corp.* v. *Gilbert, supra,* which recognizing that a plaintiff's choice of forum should rarely be disturbed, nevertheless gave discretion to the district judge in ruling on a motion to dismiss based upon *forum non conveniens* if certain criteria were met. However, *Gulf Oil* involved the *transfer* of an action, brought by a nonresident, from one state in the United States to another.[5] Mr. Justice Jackson speaking for this Court never intended to emasculate the rights of resident United States citizens by forcing them from their legitimate home forum where they have jurisdiction over defendants and requiring them to litigate in a foreign tribunal. *Gulf Oil* merely sought to relegate the plaintiff to an equally competent federal court which had a closer nexus to the disputed issue.

Moreover, the *en banc* Court's interpretation of the decision in *Koster, supra,* announcing two independent criteria to determine the proper forum for resolution of a dispute, allows a district court to dismiss an American plaintiff's action on the sole criterion that trial in the chosen forum would be inappropriate because of "considerations affecting the court's own administrative and legal problems." *Id.* at 524. This means that a U.S. citizen's action can be dismissed to a foreign forum where he may (and in this

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[5] The *Gulf Oil decision* was codified into law the following year by the enactment of 28 U.S.C. § 1404(a) which provides:

> "(a) For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

case would) recover far less of his provable loss simply because of an overburdened federal docket.

The congested federal courts do pose a serious threat to judicial efficiency and this dilemma has resulted in movements for judicial reform by Congress such as the elimination of diversity jurisdiction. However, eliminating diversity jurisdiction would simply relegate the plaintiff to an equally capable state court, not deprive him of any American forum. Federal district courts have attempted to utilize other recognized doctrines, such as remanding cases removed from the state court or abstaining from hearing certain cases. Once again, the effect of these decisions is to relegate the plaintiff to the state court.[6]

The potential prejudice in future cases from the broad statement of dismissal in *Alcoa* cannot be underestimated. It goes beyond the immediate fact that a judgment in Trinidad would be limited to approximately $570,000 while a judgment in a U.S. court could exceed $8,000,000. It extends to the unknown elements involved in a foreign trial and the undercurrent of prejudice against American citizens which permeates the world news. Judge Van Graafeiland, in dissenting from the *Alcoa* (*en banc*) majority succinctly observes:

> "The economic demands of the poorer countries and their nationalistic treatment of foreign investments

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[6] However, this Court in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 344-45 (1976), citing *McClellan* v. *Corland*, 217 U.S. 268 (1910), *Chicot County* v. *Aterwood*, 148 U.S. 529 (1893) and *Hyde* v. *Stone*, 20 How. 170 (1858), has warned that . . . "an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly held in the federal court in the first instance may be dismissed or referred to state courts for such reason." Such a statement should, no doubt, be looked at more strictly where the effect of the district court's ruling would preclude an American plaintiff from access to any United States court.

> are evidence to some of a 'fissuring of planetary policy that is both wide and deep.' 'Barriers of emnity and fear' divide many of this planet's inhabitants. Armed conflict, terrorism, and rebellion vie for international headlines. American citizens are held hostage in American embassies. Stable governments and independent judiciaries are hardly universal phenomena."
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> *Alcoa* (dissent) (*en banc*), *supra,* at 5979.

Furthermore, the retention of jurisdiction in an American court would not offend the sovereignty of the Republic of Trinidad and Tobago. The *Alcoa* case involves two corporations neither of which is incorporated in Trinidad. The vessel was owned by a Liberian corporation and the pier was owned by an American corporation. Trinidad has no interest in this dispute other than the fortuitous fact that the allision occurred there. Thus, the Trinidad court would be in no better position than the U.S. Court to hear the dispute.[7]

The inequity of the *Alcoa en banc* decision derives from the fact that an American corporate plaintiff, paying a considerable amount of tax dollars into the local economy, is being denied access to the local district court because the trial might be costly and burdensome. Consequently, a Liberian defendant, incorporated in Liberia merely to streamline its costs, is able to force an American plaintiff out of its own courts under the guise of a *forum non con-*

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[7] The facts in the instant matter are unlike those in *Farmanfarmaian* v. *Gulf Oil Corp.*, 588 F2d 880 (2d Cir. 1978). There, plaintiff, a non-resident alien (an Iranian citizien) with no connection to the United States, unsuccessfully sought to use an American Court to resolve a dispute involving Islamic and civil law arising out of an alleged conspiracy to breach contractual rights in a stock option plan. But consider the difficulties an American plaintiff would encounter if relegated to the Iranian courts in such a case.

veniens argument. The *en banc* decision enables it to further streamline these costs by obtaining jurisdiction in a foreign forum which severely restricts the U.S. citizen's potential recovery.

Congress has chosen to rigidly regulate the United States shipping industry, requiring some of the highest safety and wage standards throughout the world. The practical effect of these measures is that a small country such as Liberia, which imposes minimal governmental control, boasts a flourishing shipping industry, while our marine industry and the international corporations involved in it, struggle to compete. In view of the United States maritime policy, the courts should exhibit a *parens patriae* attitude towards its domestic shipping industry and to Americans in general, and give an American corporate plaintiff the protection of its home forum barring any denial of due process or substantial justice to a foreign defendant.

In this case *sub judice,* no basic injustice has been indicated by the defendant. More importantly, the burden of proving an intent to "vex" or "harass" was never required of the defendant. Norcross Shipping's motion to dismiss on grounds of *forum non conveniens* was supported by "two short, almost cursory, affidavits of one of defendant's New York attorneys, with an attached affidavit of the ship's master . . . ." *Alcoa, supra,* at slip op. 4585 (August 31, 1978) (Judge Van Graafeiland, dissenting). The substance of these documents merely asserted an inconvenience to the defendant.

In affirming the district court's "convenience standard" as a method of determining the appropriate forum, the *en banc* Court heavily emphasized the factor of court efficiency and expediency. This emphasis, however, sacrifices the most important consideration of a *forum non conveniens* analysis—to do substantial justice.

CONCLUSION

In view of the foregoing reasons, it is respectfully urged that the petition for a writ of *certiorari* be granted.

Respectfully submitted,

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